

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WILLIAM BURGESS,

Defendant-Appellant.

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UNPUBLISHED

November 14, 1997

No. 190984

Recorder's Court

LC No. 95-002287-FC

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549,<sup>1</sup> two counts of assault with a dangerous weapon ("felonious assault"), MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of forty to eighty years' imprisonment for the second-degree murder conviction and two to four years' imprisonment for each of the felonious assault convictions. He was also sentenced to a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing to instruct the jury on self-defense. We disagree. A trial court is obligated to instruct with regard to a defense only where there is some evidence to support giving that instruction. *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). We have articulated the requirements for self-defense:

In Michigan, the killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. A defendant is not entitled to use any more force than is necessary to defend himself. Furthermore, the defense is not available when a defendant is the aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. [*People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993)(citations omitted).]

Here, defendant shot and killed the victim, Joseph Dues, after the victim repossessed defendant's car. There was no evidence that defendant had any reason to fear the victim at the time of the shooting.

Although the victim apparently stood taller and weighed more than defendant, defendant was carrying a gun. In addition, the evidence showed that defendant, upon learning that the victim had repossessed his vehicle, pursued the victim and shot him in the chest at close range. There was simply no evidence that defendant honestly and reasonably believed that his life was in danger or that a threat of serious bodily harm existed. We also note that the evidence made it clear that defendant was the initial aggressor, which negated any claim of self-defense. Thus, the trial court did not err in refusing to instruct on self-defense.

Defendant next argues that the trial court erred in refusing to instruct the jury regarding imperfect self-defense. He argues that the court should have instructed the jury that they could consider the cognate lesser offense of voluntary manslaughter based on this theory. Indeed, a valid claim of imperfect self-defense reduces second-degree murder to voluntary manslaughter. However, in Michigan, the doctrine of imperfect self-defense applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Here, as noted above, defendant was not entitled to a self-defense instruction because there was no evidence that he honestly and reasonably believed that his life was in danger or that a threat of serious bodily harm existed. Defendant claims, however that there was evidence that he and the victim struggled over his gun, and that the jury should have been allowed to decide whether it was reasonable for him to use the gun to prevent the victim from using it on him. We do not believe that such a scenario entitles a defendant to an instruction regarding imperfect self-defense. The fact that the two struggled over a gun that defendant pulled on the victim does not constitute evidence that defendant had an honest and reasonable belief his life was in danger or that a threat of serious bodily harm existed. A struggle is merely evidence that the victim attempted to act in his own self-defense. We do not believe that a defendant should benefit from the fact that a victim tried unsuccessfully to defend himself. See *People v Rodriguez*, 212 Mich App 351, 354; 538 NW2d 42 (1995). Thus, the trial court did not err in refusing to give an instruction on voluntary manslaughter based on imperfect self-defense.

Defendant also argues that there was evidence that the victim had a gun, and that this evidence was sufficient to warrant self-defense or imperfect self-defense instructions. First, we note that there was only a scintilla of evidence that the victim had a gun. One witness, who observed the scene from about 200 feet away, saw a gun, but was not sure who had it; she thought the victim had the gun. All the other evidence indicated that it was defendant who had the gun. Even if we consider this “some evidence” that the victim had a gun, it is not evidence that defendant had an honest and reasonable belief that he was in danger. The record is simply devoid of evidence supporting a self-defense instruction. Defendant chased down and shot the victim. To say that he acted in self-defense would go against basic logic, and the trial court did not err in refusing to give instructions on self-defense and imperfect self-defense. See *People v Mills*, 450 Mich 61, 82; 537 NW2d 909, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995).

Defendant also contends that the trial court erred in failing to instruct on voluntary manslaughter as a cognate lesser offense. We disagree. Voluntary manslaughter is indeed a cognate lesser included offense of first-degree premeditated murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). A trial court is required to issue an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence

adduced at trial would support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994). Here, there was no evidence that defendant committed the killing “under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool.” *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Provocation is legally adequate when a killing is the result of “such provocation that an ordinary man would kill in the heat of passion.” *People v Younger*, 380 Mich 678, 681; 158 NW2d 493 (1968). Here, there was simply no evidence of any adequate provocation. Accordingly, the trial court did not err in refusing to instruct on voluntary manslaughter.

Next, defendant argues that the trial court erred in denying his motion to quash the information on the first-degree murder charge because there was insufficient evidence of premeditation and deliberation. We disagree. In reviewing the circuit court’s denial of defendant’s motion to quash, we must determine whether the examining magistrate abused its discretion in binding defendant over to circuit court. *People v Hardy*, 188 Mich App 305, 308; 469 NW2d 50 (1991). Review is limited to the preliminary examination transcript. *People v Waters*, 118 Mich App 176, 183; 324 NW2d 564 (1982). The examining magistrate must bind over a defendant for trial if the evidence presented at the preliminary examination establishes that a felony has been committed and there is probable cause to believe that the defendant committed the charged offense. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Circumstantial evidence and reasonable inferences arising therefrom are sufficient to support the bindover as long as such evidence establishes probable cause. *People v Whipple*, 202 Mich App 428, 432; 509 NW2d 837 (1993).

Here, the evidence presented at the preliminary examination established probable cause to believe that defendant “intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The preliminary examination testimony revealed that defendant, while in possession of a gun, chased the victim. After locating the victim, defendant wielded a gun and a struggle ensued. With the victim pinned on all fours, defendant reached underneath the victim, fired a single shot from close-range into the victim’s chest, and then threatened to shoot again. This evidence was sufficient to establish probable cause to believe that defendant committed first-degree murder, and the trial court did not err in denying defendant’s motion to quash.

Defendant also argues that the charge of first-degree murder should not have been submitted to the jury because it was unwarranted by the proofs. However, defendant did not move for a directed verdict below, MCR 6.419; *People v Lugo*, 214 Mich App 699, 711; 542 NW2d 921 (1995), and thereby waived this issue on appeal. Even if this issue were preserved, we would conclude that it is without merit. The evidence submitted at trial was sufficient to allow a rational trier of fact to conclude that the elements of first-degree murder were proven beyond a reasonable doubt.<sup>2</sup> See *Anderson*, *supra* at 537-538.

Next, defendant contends that there was insufficient evidence to sustain his second-degree murder conviction. We disagree. When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

To establish the crime of second-degree murder, it must be shown that defendant caused the death of the victim and that the killing was done with malice and without legal justification. *Kemp, supra* at 322; *Neal, supra* at 654. Here, defendant chased the victim while in possession of a .25 caliber semiautomatic weapon, pinned the victim on all fours, and fired a single shot into the victim's chest, thereby killing him. Defendant then repositioned the gun against the victim's head as if to finish him off, but never fired. The weapon that fired the deadly blast was recovered from defendant's right front pocket. No weapons were found on or near the victim's body. Viewed in the light most favorable to the prosecution, this evidence was sufficient to support defendant's second-degree murder conviction.

Next, defendant contends that the cumulative effect of the foregoing errors resulted in an unfair trial. In view of our resolution of the foregoing issues, this claim is without merit. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Last, defendant argues that the trial court abused its discretion in sentencing him to forty to eighty years' imprisonment for the second-degree murder conviction. Defendant argues that his sentence violated the rule in *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). However, *Moore* has essentially been overruled, and defendant's argument is without merit. See *People v Lemons*, 454 Mich 234, 256-259; 562 NW2d 447 (1997); *People v Kelly*, 213 Mich App 8, 12-16; 539 NW2d 538 (1995).

Defendant also asserts that his forty-year minimum sentence is disproportionate pursuant to *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We review the proportionality of sentences for an abuse of discretion. *Id.* at 635-636. The key test of proportionality is not whether the sentence departs from or adheres to the recommended guidelines range, but whether it reflects the seriousness of the matter. *Lemons, supra* at 260. Here, we find that the forty to eighty-year sentence imposed by the trial court accurately reflected the seriousness of the matter. As noted by the trial judge during sentencing, the murder committed by defendant in this case is both appalling and senseless. Defendant hunted the victim down and killed him for attempting to repossess his car, despite his knowledge from working as a credit manager at Chrysler for many years, that repossession was likely due to his failure to make payments. Based upon the senselessness of defendant's actions, the trial court considered defendant to be a tremendous threat to society. We agree and conclude that the trial court did not abuse its discretion in fashioning defendant's sentence.

Affirmed.

/s/ Clifford W. Taylor

/s/ Joel P. Hoekstra

<sup>1</sup> Defendant was originally charged with first-degree premeditated murder, MCL 750.316; MSA 28.548.

<sup>2</sup> Defendant also asserts, without support, that the guilty verdict was against the great weight of the evidence. Even if this issue were properly preserved and argued, we would conclude that it is without merit. See *People v Harris*, 190 Mich App 652, 658-659; 476 NW2d 767 (1991).